UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YURI GARMASHOV,

Plaintiff,

- against -

UNITED STATES PARACHUTE ASSOCIATION, INC.,

Defendant.

21-cv-4917 (JGK)

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiff, Yuri Garmashov, brought this action against the United States Parachute Association, Inc. ("USPA"), in connection with the suspension of his membership from the USPA. The plaintiff now moves to enforce a settlement agreement into which the plaintiff claims the parties entered, and for an award of the attorney's fees incurred in preparing the motion. For the following reasons, the motion to enforce the settlement agreement is **granted**, and the motion for attorney's fees is **denied**.

I.

The following facts are taken from the parties' motion papers, and are not disputed.

The plaintiff was a member of the USPA until 2016, when he was suspended from the organization. The plaintiff then brought this action, alleging that his suspension constituted a breach of contract and bringing certain related claims. For purposes of

this litigation, the plaintiff is represented by Alex B. Kaufman and Eric M. Underriner, and the defendant is represented by Kenneth A. McLellan and Keith R. Roussel. The defendant moved to compel arbitration, but the Court denied that motion. ECF No. 25. The Court referred the parties to mediation. Id.

On May 11, 2022, the parties participated in a mediation via videoconference with court-appointed mediator Holly H. Weiss.[1] During the mediation, the parties appeared to reach agreement, and concluded the mediation.

On May 11, 2022, at 2:18 p.m., McLellan emailed the mediator, stating, "We communicated with our clients and the carrier last night and this morning, and their position has not changed. The offer remains: $ [redacted] firm. No membership or ratings. Take it or leave it. Confidentiality and no admission of liability. Full general release."[2] ECF No. 39 ¶ 20. The email explained that the defendant's original understanding had been that the plaintiff was seeking reinstatement, as opposed to money damages, and that the defendant was surprised when the plaintiff indicated that he would not settle unless he received

[1] The docket reflects that the mediation took place on May 9, 2022. However, because the defendant does not dispute the plaintiff's assertion that the mediation took place on May 11, 2022, the Court also accepts this date, which in any event does not affect the outcome of the case.

[2] Unless otherwise noted, this Memorandum Opinion and Order omits all internal alterations, citations, footnotes, and quotation marks in quoted text.

some monetary compensation. McLellan went on to indicate that there had been a point where

> the USPA was still willing to permit Plaintiff to become a member and to pay Plaintiff some monetary amount to resolve this lawsuit mostly on a cost basis. We advised during the course of the negotiations that at some point if the monetary demand became too high that the Plaintiff's Request for reinstatement to USPA would no longer be considered/offered. When the USPA's offer went up to $ [redacted] membership was removed from the equation. Plaintiff's counsel then took the stance that only a [higher] offer would be considered. We and the USPA rightfully considered that as an abandonment of the request for membership. Plaintiff and his counsel burned a bridge at that point. . . . We ask that you convey this. Of course, when we start doing discovery, the offer could change or be pulled.

Id.

Around this time, plaintiff's counsel drafted a draft settlement agreement in accordance with plaintiff's counsel's understanding of the agreement reached at the mediation. Although the draft is redacted, the defendant does not dispute the plaintiff's assertion that the only terms delineated in the draft were that "[t]he case would settle for a specified sum of $150,000, with mutual dismissals with prejudice, mutual general releases of all claims and allegations, mutual confidentiality as to the terms of the Agreement, and no admission of liability by any party." ECF No. 37 ¶ 20; id., Ex. 5. The plaintiff executed the document entitled "Mediation Settlement Agreement Terms and Conditions," and at 4:33 p.m., the draft was circulated to defense counsel, with a copy to the mediator.

On May 12, 2022, at 3:53 p.m., Kaufman, plaintiff's counsel, asked the mediator for an update. At 8:35 p.m., McLellan, defense counsel, emailed all counsel and the mediator, stating:

> Holly Weiss asked that I respond to this email to confirm that we have an agreement in principle, which we do. We sent the term sheet to our client for signature. If you want to move the process along, please end [sic] a draft formal proposed settlement agreement. Carriers generally require an executed IRS W-9 form and written payment instructions.

Id. Ex. 8 (emphasis added).

At 11:06 p.m., Kaufman replied, "Can you please confirm that the term sheet is accepted?" Id. On May 13, 2022, at 8:12 a.m., McLellan replied and appeared to add a term that Garmashov "doesn't come back," and stated that term is "implicit in this deal":

> The term sheet added mutual general releases, which I don't expect to be a problem and will recommend. I anticipate speaking with [USPA executive director] Mr. Berchtold today on the sheet. The point of this settlement is that USPA pays money and, in return, does not have to deal with Mr. Garmashov any more. That is implicit in this deal, and will be spelled out in the formal settlement agreement. He doesn't come back. You don't come back. No more applications to be in the USPA; no demands for arbitration; no applications to get back in. I want that to be clear. Please confirm that we're in agreement on this.

Id. (emphasis added). At 12:02 p.m., Kaufman responded:

> As per your May 12th email at 8:35pm you agreed we have an agreement in principle. Those were the only terms discussed and agreed to. We will move to enforce the settlement agreement per the term sheet and acceptance

> email. Please confirm that this will not be necessary. If it is, we will seek additional costs and attorney fees for this effort. Your revisionist history email of this morning interjects new terms . . . . To be crystal clear — Mr. Garmashov has not and will not agree to those proposed covenants that have just appeared this morning — and certainly not at the agreed upon price of . . . per the agreement in principle.

Id.

At 12:07 p.m., McLellan responded, "Is it your position that he will be seeking to reapply for membership? The point of this deal is that he goes away. Do you have a different understanding?" Id.

At 12:14 p.m., Kaufman replied, "Here are the wire instructions. The w-9 will be forthcoming." Id. As of the date of this Memorandum Opinion and Order, the defendant has not signed the term sheet.

On May 20, 2022, the plaintiff filed a motion to enforce the purported settlement agreement and for attorney's fees incurred in preparing the motion. ECF No. 36. That motion is now before the Court.

II.

A "district court has the power to enforce summarily, on motion, a settlement agreement reached in a case that was pending before it." Cruz v. Korean Air Lines Co., 838 F. Supp. 843, 845 (S.D.N.Y. 1993). A party seeking to enforce a purported settlement agreement has the burden of proof to demonstrate that

the parties actually entered into such an agreement. See Lightwave Techs., Inc. v. Corning Glass Works, 725 F. Supp. 198, 200 (S.D.N.Y. 1989).

A settlement agreement is a contract, and, to form a valid contract, there must be "an objective meeting of the minds," as determined by "the objective manifestations of the intent of the parties as gathered by their expressed words and deeds." 26th St. Partners, LLC v. Fed'n of Orgs. for N.Y. State Mentally Disabled, Inc., 122 N.Y.S.3d 349, 351 (App. Div. 2020).

Under New York law, there are two kinds of preliminary contracts. Murphy v. Inst. of Int'l Educ., 32 F.4th 146, 150 (2d Cir. 2022).

> The first (Type I) occurs when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation. This kind of agreement is preliminary only in the sense that the parties desire a more elaborate formalization of the agreement which, although not necessary, is desirable. The second (Type II) is one that expresses mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated. In the second type of preliminary agreement, the parties bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that has been settled in the preliminary agreement. While a party cannot demand performance under a Type II agreement, a party may demand that his counterparty negotiate the open terms in good faith toward a final contract incorporating the agreed terms.

Id. at 150-51. In determining whether a preliminary agreement between the parties is binding as a Type 1 agreement, the Court may consider a number of factors, including:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.

Winston v. Mediafare Ent. Corp., 777 F.2d 78, 80 (2d Cir. 1985); accord Chang v. CK Tours, Inc., No. 18-cv-6174, 2022 WL 1963663, at *4 (S.D.N.Y. June 6, 2022). The existence of terms on which the parties have not agreed does not preclude the existence of a Type I agreement as long as "there were no issues outstanding that were perceived by the parties as requiring negotiation." Murphy, 32 F.4th at 152.

The plaintiff contends that, as of McLellan's May 12, 2022, 8:35 p.m. email, there was an enforceable agreement whereby the defendant would pay the plaintiff a lump sum in exchange for a general release. The plaintiff acknowledges that this purported agreement did not provide for the plaintiff's re-admission to the USPA. The defendant argues that, to the contrary, the parties had not reached an enforceable agreement, because the parties had not agreed on certain terms — most importantly, whether the settlement agreement would bar the plaintiff from ever re-applying for admission to the USPA.

In this case, on balance, the Winston factors indicate that the parties reached a binding and enforceable agreement as of McLellan's May 12, 2022, 8:35 p.m. email in which the defendant's agent - its attorney - confirmed that "we have an agreement in principle, which we do." ECF No. 37, Ex. 8. At that point, the terms of this simple settlement agreement had been agreed to. The first factor counsels in favor of finding a binding agreement, because the parties did not expressly reserve the right not to be bound in the absence of a "more elaborate formalization." See id. at 150; Kowalchuk v. Stroup, 873 N.Y.S.2d 43 at *2, *5 (App. Div. 2009); N. Fork Country, LLC v. Baker Pubs., Inc., 436 F. Supp. 2d 441, 443, 445 (E.D.N.Y. 2006). The second factor weighs against finding a binding agreement, because there was no substantial partial performance, other than the exchange of promises and the subsequent transmission of a W-9 form.

The third factor cuts in favor of finding a binding agreement. At the time that McLellan sent the May 12, 2022, 8:35 p.m. email, the parties objectively appeared to have reached agreement as to material terms: the parties had agreed on a dollar sum, there would be mutual general releases and dismissal of the litigation, and there was neither a provision for the plaintiff's readmission to the USPA as part of the settlement agreement nor an explicit provision that the plaintiff would not

apply for readmission. In his 8:35 p.m. email, defense counsel confirmed that there was an agreement in principle. While the terms of the general releases and confidentiality provisions had not been drafted, there was no indication, even in the subsequent 11:06 p.m. email, that there would be a problem. See Murphy, 32 F.4th at 152 (finding an enforceable Type I agreement despite the existence of open terms, including a confidentiality provision that the parties had described as "material," because there was "no evidence . . . to suggest that those new terms were considered open issues in need of negotiation"); N. Fork Country, 436 F. Supp. 2d at 443, 446; Pretzel Time, Inc. v. Pretzel Int'l, Inc., No. 98-cv-1544, 2000 WL 1510077, at *4 (S.D.N.Y. Oct. 10, 2000).

While the defendant argues that it remained to be negotiated whether the plaintiff would be permitted to re-apply for membership in the USPA, the communications between the parties do not reflect any discussion of such a condition before defense counsel confirmed in his 8:35 p.m. email that "we have an agreement in principle." ECF No. 37, Ex. 8. The defendant's email to the mediator did not include a condition that Garmashov would never re-apply for membership in the USPA. The first time this condition is mentioned is in the defendant's May 13, 2022, 8:12 a.m. email, in which defense counsel described this condition as "implicit." Accordingly, based on the parties'

objective manifestations of their intent, the parties had agreed on all materials terms as of McLellan's May 12, 2022, 8:35 a.m. email, and defense counsel's subsequent May 13, 2022, 8:12 a.m. email was an effort to add a condition that had not been agreed to.

Finally, the fourth factor, whether this type of contract is usually reduced to writing, cuts in favor of finding a binding agreement. Under this factor, the complexity of the agreement, not its categorization, is the relevant consideration. Hostcentric Techs., Inc. v. Republic Thunderbolt, LLC, No. 04-cv-1621, 2005 WL 1377853, at *9 (S.D.N.Y. June 9, 2005) ("Since the Winston test is designed to determine if a settlement agreement is binding absent a formally executed agreement, it would be a strange test if the fourth factor always favored finding no agreement on the ground that settlement agreements usually are written."). Rather, the correct question is "whether the settlement agreement terms are sufficiently complex or involve long time periods, such that there should be a formal writing." Id. In this case, the terms are very simple, involving in essence only a single monetary payment. See In re Estate of Brannon v. City of New York, No. 14-cv-2849, 2016 WL 1047078, at *3 (S.D.N.Y. Mar. 10, 2016). Moreover, the fact that there was a writing — even an informal

one — further counsels in favor of finding a binding agreement. Hostcentric, 2005 WL 1377853, at *9–10.

Three of the four Winston factors support the finding that the parties had reached an enforceable agreement as of McLellan's May 12, 2022, 8:35 p.m. email. Consequently, at that point, there were objective manifestations of a meeting of the minds, and the parties had an enforceable agreement. McLellan's email sent several hours later stating that an "implicit" term of the deal was that the plaintiff would not re-apply to be a member of the USPA was an attempt to add a new term to the agreement. Because the plaintiff did not assent to that term, it is not part of the parties' agreement. See Murphy, 32 F.4th at 153.

For these reasons, the motion to enforce the settlement agreement is **granted**.

III.

The plaintiff seeks an award of attorney's fees for the time expended drafting the motion for enforcement of the settlement agreement. However, under Federal Rule of Civil Procedure 54(d)(2)(B)(ii), a motion for attorney's fees must "specify the judgment and the statute, rule, or other grounds entitling the movant to the award." Neither the plaintiff's motion nor his memorandum of law in support of the motion identifies any legal basis for such an award, which is a

sufficient basis to deny the motion for attorney's fees. See Arcari v. 46th St. Dev. LLC, No. 10-cv-3619, 2011 WL 832809, at *7 (S.D.N.Y. Mar. 2, 2011). In reply, the plaintiff argues that attorney's fees are warranted because the defendant acted in "bad faith, vexatiously, and wantonly." ECF No. 40 ¶ 28. But the Court need not consider arguments raised for the first time in reply, see Aviva Trucking Special Lines v. Ashe, 400 F. Supp. 3d 76, 80 (S.D.N.Y. 2019), and the argument in any event is without merit. See Hostcentric, 2005 WL 1377853, at *10 (collecting cases). The motion for attorney's fees is therefore **denied.**

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the arguments are either moot or without merit. For the foregoing reasons, the motion to enforce the settlement agreement is **granted**, and the motion for attorney's fees is **denied.**

The Magistrate Judge should supervise the execution of the settlement agreement and the dismissal of this case in accordance with the settlement agreement.

SO ORDERED.
Dated: New York, New York
November 29, 2022

John G. Koeltl
United States District Judge